TEXAS *VERSUS* WHITE

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CHAPTER IV

SUBSEQUENT LITIGATION

Texas v. Hardenberg

As has already been remarked, the decision and decree in the case of *Texas v. White* left the settlement of many of the points involved to later proceedings. The first case which arose in this process of legal adjustment was that of *Texas v. Hardenberg.*[1] The bonds held by Hardenberg had been redeemed under an agreement which has already been noticed. When the court decreed that the defendants were liable to suit for the recovery of the indemnity bonds, Hardenberg was included in spite of the fact that his bonds had been paid. Under these circumstances, Texas sued in the Supreme Court for the delivery of the bonds or their proceeds. In answer to the bill in this suit, Hardenberg endeavored to reopen the discussion of the merits of the original case by reviewing the history of his purchase and attempting to show that this action had been in good faith. He urged further that his bonds had been paid by the United States, and that his counsel should be heard as to the effect in law of a payment which had taken place before he had been served with notice of a contest by the State of Texas. On the whole, he argued that there had been an error of pleading in the original case and that the bill had only prayed for the rendition of the bonds, not the proceeds.[2]

The opinion of the court was delivered by Chief Justice Chase. The court, at the outset, declined to consider the bill in the case of *Texas v. White* to be of the narrow and restricted character assigned to it. by the defendant. To interpret it so would, it was alleged, savor of "extreme technicality." The clause of the bill asking expressly for the injunction and decree had also petitioned for such other comfort as the court might see fit to allow. This clause was

[1]10 Wallace, 68, decided December term, 1869.

[2]Paschal and Merrick for Texas; Carlisle and Evarts for Hardenberg.

considered sufficiently general and broad as to render possible the inclusion of the matters sought for by the complainant. The court then passed to a consideration of the other contentions of Hardenberg. The bill in *Texas v. White* had been filed in the Supreme Court on February 15, 1867, and Hardenberg was served with the *subpoena* on the 27th of that month. He had received payment of his bonds on the 16th. The court questioned the validity and actuality of this payment; and, in addition, held that the complaints of the Texas agents at the treasury with which Hardenberg was admittedly familiar, the institution of the suit in the case of *Texas v. McCulloch,* and the repeated postponement of the payment of his bonds by the treasury collectively constituted notification of the fact that Texas claimed the bonds and would contest the possession of them with him. It was held that the correspondence between the treasury officials and Hardenberg, the negotiations of counsel, and the articles of agreement between Hardenberg and McCulloch contained demonstrative proof of the fact that Hardenberg was aware of action of Texas. It was, therefore, unimportant to inquire whether the delivery of the coin check had preceded the service of the process. The payment of the bonds, moreover, had not been real. As the comptroller had said in a letter to Chase, "In form the bonds had been paid; in fact the proceeds had been withheld from Mr. Hardenberg, because of the legal proceedings." These proceeds, the court ordered to be turned over to the Texas representatives.

In conformity with this order, Hardenberg paid the proceeds of his thirty-four bonds into the hands of Mr. Paschal.[3]

Texas v. Chiles

This case grew out of what was supposed to have been an error on the part of Chiles in the accounting for bonds which he submitted in the case of *Texas v. White.* In that case, he and his co-defendants had accounted for some fifty-one bonds, and the decree had provided for the restoration, immediately or ultimately, of these bonds or the proceeds to the complainant. There had

[3]Similar proceedings were taken to secure payment of the Stewart bonds. It appears, however, that these were paid to the clerk of the Supreme Court. This case was one of those which were unreported for a long time. It is to be found in 131 U. S., xcvii.

been, however, no specific decree against any bonds in the possession of Chiles. Texas now entered a motion in the Supreme Court for a rule on Chiles that he might be forced to give up twelve bonds which were alleged to be a part of those concerned in the transfer from the Military Board to White and Chiles. This allegation was based partly on the answer of White which had claimed that Chiles had ten bonds unaccounted for, partly on a deposition of a man named McKinley to the same effect, and partly on an affidavit of one George Taylor that Chiles had admitted to him that he had two bonds on deposit in a Kentucky bank. It was claimed by the Texas lawyers that these bonds were now subject to the order of the court. Chiles claimed that the bonds had been acquired after the service of the injunction process and even after the issuance of the decree. It must be proved, he maintained, that the bonds were among those transferred to White and Chiles.

Mr. Justice Nelson read the opinion of the court. It was held, in the first place, that the evidence derivable from the answer of White was not competent in this case. The facts, as presented by the State, were, moreover, before the court when the decree was issued. The evidence had at that time been insufficient to warrant an order against Chiles, and it was still inconclusive. The bill in the original case had limited the accounting to the bonds in the possession of the defendants to those possessed at the time of service. The motion was, therefore, denied.

In re Paschal[4]

The immediate cause of the legal proceedings in this matter was the entertainment of two motions by the Supreme Court; ultimately the causes reach farther and deeper and lead to a consideration of a factional controversy in Texas political history. The first motion was for an order that George W. Paschal pay to the clerk of the court the sum of $47,325 in gold, an amount which he was alleged to have received through the enforcement of the decree in the case of *Texas v. White* and which was properly due to the State. The second motion was for a rule removing Paschal's name from the docket as counsel in the case of *Texas v. Peabody's Executors.*

[4]10 Wallace, 483.

The accession of Edmund J. Davis as governor of Texas, in 1870, meant that the faction of the Republican party to which Paschal belonged would be thrown out of power. If the letters which passed between the two men are to be taken as authoritative evidence, it seems clear that the governor had conceived a rather violent political antipathy to Mr. Paschal. The actual break in their official relations came in the dismissal of Paschal as legal and financial representative of the State and in the appointment to that position of Thomas J. Durant. Paschal had foreseen this outcome and had written that, "As I do not belong to his wing of the Republican party, and [as] he is one of those extreme *ab initio* radicals, who believe that every official act from secession to the present day is void, it may be after his inaugration, that my control over the controversy may cease."[5] On March 25, 1870, Governor Davis, in an official communication, notified Paschal of his removal, and requested that "you will please pay over to Hon. T. J. Durant the amount of money, bonds, and coupons in your hands belonging to the State, and out of the same that gentleman is authorized to pay you a reasonable compensation for your services."[6] In case Paschal refused obedience to this order, Durant was empowered, in the name of the State, to take legal measures to compel it. Paschal refused to comply, and the case under consideration was the result. A long and at times acrimonious correspondence followed between the various parties, in which the motives of all concerned were aired with partisan frankness.

Paschal had collected from the defendants in the case of *Texas v. White* $47,325, in which sum were the proceeds from the Hardenberg bonds and those from the bonds of Birch, Murray & Company. Out of this sum, he claimed to have spent $13,356 for various expenses and costs incident to the prosecution of the case. A large part of this disbursement, according to the itemized statement which he submitted, had gone to the three lawyers who had assisted him. As he had taken none for himself, the remainder of the sum was intact. He maintained that the State, for various claims, owed him the large sum of $102,525, and that after he had deducted the

[5]Letter to Droege & Co., *Record of Cases*, 1876, 102 (Supreme Court Library).

[6]*Ibid.*, p. 31. Davis to Paschal.

amount in his possession, there would be a remainder of more than $68,556 still due him. These claims comprised several items. Paschal had been reporter of the Supreme Court of Texas during several years, and had undertaken to print his reports for the State. He had engaged to have four hundred copies of each volume of his reports printed and bound. For this service, he was to receive seven dollars for each page contained in the volume. He had printed four volumes, for which the compensation, according to the agreement, would have been $28,280. Of this amount, the State still owed him, as he insisted, $17,577. The governor refused to make a requisition for this amount, and even ordered the State Treasurer to ignore Paschal's demands. Whatever Governor Davis thought of the printing, or of the contract under which the work was accomplished, he submitted no proof of improper conduct on the part of Paschal. In his second claim, Paschal estimated his services in the *Texas v. White* case at $20,000. This estimate, Davis pronounced to be absurd and exorbitant. There had been no definite agreement between Paschal and the State authorities regarding the compensation which he was to receive. In the absence of a stipulation for a certain fee, he was, according to his own statement, to charge "as the responsibility, the expense, the time, the learning necessary, and the services should render proper."[7] Such a situation certainly rendered a latitudinous estimation of the value of his efforts probable, if not inevitable. Governor Pease had written Paschal that his compensation depended upon the action of a future legislature or upon the amount of bonds collected. When Pease visited Washington, in 1869, he made an agreement with Paschal to collect the Peabody bonds and also those in the hands of Droege & Company. For the collection of these two sets of bonds, he was to receive a compensation of 25 and 20 per cent. respectively. In pursuance of this agreement, Paschal had set about energetically to collect the bonds; and, if his opinion is accepted, had attained considerable success, when his efforts were thwarted by his removal as agent. Since the only thing which had prevented the accomplishment of his purpose had been the interference of the gov-

[7]Paschal's affidavit, record of *In re Paschal*, p. 3. (Found in *Record of Cases*, 1876, Supreme Court Library).

ernor, Paschal now claimed his full compensation, at least in regard to the Peabody bonds. Governor Davis repudiated this claim as preposterous.

This was the situation when Durant recommended that Paschal should secure counsel with whom he, as the State's agent, could treat in accordance with the instructions of the Texas authorities. Paschal obeyed this request, and employed A. G. Riddle. After long negotiations and much correspondence, Durant proposed to honor the disbursements in the case of *Texas v. White,* and to pay Paschal $5,000 for his services in that case and $2,500 for his efforts to collect the Peabody bonds. Paschal refused to accept the compromise, and the matter was taken to the Supreme Court in the form mentioned above.

As an evidence that his service had been long, disinterested, and capable, Paschal submitted for the perusal of the court the correspondence between himself and the holders of the Peabody bonds, the firm of Dabney, Morgan & Company, of New York, and, in addition, that with Droege & Company. These negotiations referred to the three hundred bonds which Swisher had carried to England in 1862.[8] It will be recalled that Peabody bought one hundred and forty-nine of these bonds. Before he had completed the payment for them, however, he endeavored to secure a return of his money by suing Droege & Company. This suit was made in the English courts, but there seems to have been no record of a decision, although a temporary injunction was granted him. On the death of Peabody, his executors, Dabney, Morgan & Company, presented the bonds for redemption by the United States. Against this payment, the Texas agent protested unavailingly. The State endeavored to return the amount of money which Peabody had spent for the bonds, but it was not accepted. Then a suit was begun in the Supreme Court against Peabody's executors. This case was pending when Paschal was removed.[9] Of the one hundred and fifty-one bonds which had remained in the hands of

[8]See THE QUARTERLY, XVIII, 349-350. for an account of the transaction and the history of Swisher's activity.

[9]The case of *Texas v. Peabody's Executors* is mentioned on page xcvii of 131 U. S. Reports. It is, however, one of the unreported cases which have been tried before the Supreme Court. The final history of the indemnity bonds belongs to the financial and fiscal history of the State of Texas.

Droege & Company, a word must be said. Paschal had promptly laid claim to the bonds, and the English firm seemed willing to compromise with the State. This compromise had been prevented by various injunction suits, such as those of Chiles and Peabody. Finally, Paschal notified the firm that, in case restitution was not made, the Supreme Court would declare the bonds useless and cancelled, and the United States would pay them to the State of Texas; and the costs to which the house had been put would, therefore, be lost. Whether moved by this threat or not, a representative of Droege & Company was eventually sent to the United States to treat with Paschal about the transfer of the bonds. The correspondence between the two indicates that an agreement had practically been reached when Paschal was peremptorily removed by the governor of Texas.

All of these facts were presented to the court as an evidence of the fidelity and constancy of Paschal's service, and little effort was made to controvert the fact or value of this service. In addition, he stated that, in case the court forced him to pay the money collected to Texas, he would have no recourse under Texas law by which his fees might be secured.

Mr. Justice Bradley read the opinion of the court. The court claimed jurisdiction of this matter by virtue of the control it was empowered to exert over its own officers and the members of its own bar. There were certain duties which a lawyer owed to his client which the court could compel him to perform without an appeal by the client to the ordinary courses of law, and, conversely, it might protect the interests of the faithful lawyer in case they were unfairly endangered. In this particular connection, it was held that an attorney, in case he collects money for a client, should pay over all sums after he had deducted the costs and the disbursements. The question in this case was: had Paschal retained the money in his hands in bad faith, and was he, in consequence, guilty of such misconduct as would justify the interference of the court? After reciting the facts in the case, the court held that Paschal had not been guilty of conduct unbecoming an attorney in his relation with his client. The claim he made to the money was in good faith, and it would be against equity to force him to yield it up since, in that case, he would be without legal recourse. As to whether he was justi-

fied in keeping it all, or in keeping any, the court considered it unnecessary to state. The Texas authorities could appeal to the ordinary channels of the law, since there was no inhibition preventing the State from suing Paschal. In substantiation of this view, the court cited the usage in England and many of the American States to prove that an attorney had a lien upon money collected for a client who has not rewarded him for his services. The retainer of Governors Hamilton and Pease had referred to the bonds indiscriminately and particularly to those of White and Chiles; so Paschal had not violated any agreement in that respect. On these grounds, the motion to force Paschal to pay over the money to the State was denied.

The second motion, praying for the removal of Paschal as attorney representing Texas was granted. Paschal had denied that the governor had the power to remove him until he was paid. He had persisted in attempting to represent Texas until he had seriously embarrassed Durant. The court held that this was a mistaken view to take of the governor's power. The State of Texas had the right to dismiss one attorney and to employ another, although the State remained responsible for and bound by contracts already entered into with the attorney then being dismissed. Whether the State in this particular case remained liable for the whole contingent fee originally promised Paschal, or for so much of it as the services were worth, or for none of it, the court declined to say. However this might have been, the State had the unquestionable right to change representatives. "The court cannot hesitate in permitting the State to appear and conduct its causes by such counsel as it shall choose to represent it." The motion was, therefore, granted.[10]

[10]According to the decision of this matter, Paschal retained possession of the bonds and moneys in his hands at the time of his dismissal by Davis. During the administration of the latter as governor of Texas, no settlement or compromise of the controversy was effected. Later, in 1874, Governor Coke was empowered to settle with Paschal for the remainder of the debt due him for printing the Supreme Court reports. See Joint Resolution No. 12, Gammel, *Laws of Texas*, VIII, 245-246.

Huntington v. Texas[11]

The cases previously considered were tried in the Supreme Court by virtue of its original jurisdiction, but that now being noticed was taken up on appeal from the District of Columbia courts. It was a suit against William S. Huntington, the cashier of the National Bank of Washington, concerning thirty-seven of the Texas indemnity bonds. Ten of these bonds, before they came into the possession of the bank, had been the property of a Mr. Haas. He had presented them to the treasury officials for redemption, and they, as in other cases, referred the bonds to the Comptroller for his opinion as to whether the department should pay them. After a favorable report had been given, Mr. Haas had secured a loan from the bank, using the bonds as security. The bonds were accepted, and the money was advanced to him. Later Haas by letter informed the treasury department of his action, and requested that the bonds be paid to Huntington as the representative of the bank, and the request was complied with. Fourteen other bonds of the thirty-seven were owned by the same man, and the circuitous process of redemption was repeated. The remaining thirteen bonds were the property of Huntington himself. In the interval between the two payments already recorded, he had purchased these bonds in good faith and for consideration. The first ten bonds had been paid before Texas had entered a protest, and when Huntington bought his bonds, there was, according to his testimony, no protest on file. When he asked for payment, however, there was a complaint from the State. He claimed that he had made the purchase on the belief that his bonds would be paid as had been those of Haas, and that he had taken the precaution to inquire whether there was a protest against such payment.

The State relied entirely upon the arguments and the decree made in the case of *Texas v. White*.[12] It was claimed that since the bonds did not bear the indorsement of the governor, the title of the State had not divested, that these bonds were a part of those which had been in the hands of White and Chiles. The defense challenged these facts, and claimed that there was no proof that

[11]16 Wallace, 402.

[12]Merrick and Durant were the attorneys for the State.

these bonds had been purchased by the original holders after maturity, nor that the transaction had been other than lawful and innocent. It was argued that the absence of the governor's signature was not proof of the fact that the bonds were a part of those once held by White and Chiles. There had been, it was contended, other bonds issued without this signature, which were then lawfully held by innocent parties.[13] The appeal had been taken on the grounds that the charge to the jury in the lower court had not left sufficient choice and discretion in deciding this point.

The opinion was delivered by Chief Justice Chase. The court, in the beginning, considered the question of the effect of the governor's indorsement, and that of the act repealing the requirement. In the latter connection, the opinion reads, "But we have held such a repealing act was absolutely void, and that the title of the State could in no case be divested." This view the court proceeded to modify to the extent that the act became legal and operative whenever the transference of bonds was made for a legitimate and innocent purpose, such as for the support of eleemosynary institutions, and not in support of the rebellion. In every case where the indorsement was lacking, the validity and legality of the alienation depended upon the legitimacy of the object and purpose of the transaction. If the purpose was lawful, the transfer was legal and the repealing act valid. With this change of interpretation in mind, the court held that the charge of the lower court was unfair in not allowing sufficient latitude in the judgment of the jury. The decision was, therefore, reversed.

Texas v. The National Bank of Washington[14]

This was a suit for the possession of nineteen bonds then in the hands of the bank and others, including the cashier, whose names appeared in the bill. It was testified by the comptroller of the treasury, Mr. Tayler, that in his opinion, based upon careful calculation from certain papers in his office, these bonds were

[13] J. H. Ashton and W. S. Cox represented Huntington.

[14] 20 Wallace, 72. This also was an appeal from the District of Columbia courts. Decided in 1873.

a part of those once in the possession of White and Chiles. This was also the opinion of Judge Paschal. These men did not, and apparently could not, say definitely, however, that they knew that the bonds had been transferred by the Military Board. The case of the State rested upon this evidence and upon the fact that the bonds were unindorsed. The defense contended that the testimony of Tayler and Paschal was mere opinion and no evidence. It was argued that the absence of the governor's indorsement was not proof of a lack of title on the part of the holder. It was clearly established that certain bonds issued to the Southern Pacific Railroad, one hundred and forty-eight in number, had not been so indorsed. The State had not been consistent in making this requirement, and some thirteen acts were cited in which the requirement was not even mentioned and apparently not observed in the execution of the acts. It was pointed out, furthermore, that no one knew definitely the numbers of the bonds delivered to White and Chiles.

The opinion of the court was delivered by Justice Miller. The case of the complainants rested upon the assumption that the bonds had once been in the hands of White and Chiles, thus having all the taint attendant upon that fact. In the face of the denial of the accuracy of this allegation by the defendants, the court held that Texas must establish it beyond doubt. The court considered that the evidence adduced to prove this contention was of a very unsatisfactory sort, and altogether incompetent for the purpose. "In short," it was said, "the testimony on this branch of the subject is an absolute failure."[15]

The opinion of the court presented a very interesting and tremendously illuminating treatment of the legal effect of the governor's indorsement. Speaking of the entire controversy on this point and of the view taken by Chief Justice Chase, the court said,

> It is true that in the first of these cases the eminent judge who delivered the opinion, in addition to deciding that bonds were overdue when delivered to White and Chiles, and for that reason subject to an inquiry as to the manner in which they had obtained possession of them, gave an additional reason why defendants could not hold them as *bona fide* purchasers, that they had not been indorsed by the governor as was required by the statute

[15] 20 Wallace, 82.

of the State of Texas. . . . All of this, however, was unnecessary to the decision of that case, and the soundness of the proposition may be doubted.

The celerity with which the finding of the lower court was reversed very clearly demonstrated that the "proposition" was no longer considered sound. This was a frank admission that Chief Justice Chase had been in error in assigning so much force to the statutory requirement of the governor's signature.

The court held that the opinion in the case of *Huntington v. Texas* governed this controversy. The modification of the earlier views was reaffirmed by the court, and on these grounds the case was reversed and directions were given for the dismissal of the bill.

In an opinion of considerable length and great power of reasoning, Justice Swayne concurred in the decision, but submitted reasons slightly different from those of the majority. He went much farther than the court regarding the effect of the act repealing the requirement of the indorsement of the governor. This act, he said, was an ordinary piece of legislation. "If it had in view the promotion of the rebel cause, it was too remote from that end, and its tendency too indirect to render it fatally liable to that objection. The repeal put an end to the restriction." He went on to say that the original law had no legal effect upon the title of the *bona fide* holder.

In re Chiles[16]

This matter was the result of the introduction of a motion in the Supreme Court for a rule on Chiles to show cause why he should not be adjudged guilty of contempt of court for having violated the decree in the case of *Texas v. White*. The decree, it will be remembered, had enjoined the defendants from setting any claim to the bonds mentioned in the bill in that suit. It will also be recalled that there were two sets of bonds mentioned in the original bill, namely, those actually turned over to White and Chiles by the Military Board, and those which were in England in the possession of the firm of Droege & Company. Of this last group, the bill had referred to the seventy-six bonds which were

[16]22 Wallace, 157.

sold to White and Chiles according to the contract. Chiles had not relinquished his claim to these bonds although it seemed to have been invalidated by the decision in *Texas v. White*. He had, at several times, notified Droege & Company of his ownership, and had stated his intention of reclaiming them by legal measures in the English courts. Finally, on July 17, 1874, he wrote to this firm, repeating the statement of his right to the seventy-six bonds, and asserting his intention of instituting an injunction suit to prevent the disposal of them to any other party. When this letter became known, the Texas agent appeared before the Supreme Court and made the motion already noticed. In answer to the charges therein preferred against him, Chiles admitted that he had made the claim of ownership, and stated, furthermore, that he intended to secure his rights by legal measures. He denied, however, that he was guilty of any contempt of court, or that he was endeavoring to nullify and thwart the injunction imposed upon him by the court in the earlier case. On the contrary, he maintained that his assertion of right to the bonds was based upon grounds other than those denounced in the decree. His present claim was founded on a contract made with the Military Board on March 4, 1865,—a contract which was separate and distinct from that made previously to which White and Chiles had been parties on one side. In the later contract, Chiles had not been associated with White. The decree had annulled the contract between the board and White and Chiles, but it had had no effect upon the later one, for the court could not impeach a contract which had not been mentioned in the bill. The second contract, moreover, was not operative until the first had been vacated or annulled; the decree having declared the first contract void, the other became effective. As to the idea that Chiles was in contempt of court, the defense argued that the law of injunctions was not framed to prevent a person from claiming property either orally or in writing. The decree in *Texas v. White* had called the contract of March 4th, which had hitherto been in abeyance, into active life, and Chiles had made known his rights under it,—a fact which had no necessary bearing upon the decree. It was then denied that the court had the right to pass upon money or bonds held by a foreign subject and located in a foreign country.

Messrs. Merrick and Durant for the complainant charged that Chiles was striving to overthrow the decision in *Texas v. White,* that he was preventing the State from deriving the just benefits of that victory, and that he was violating the decree. They demanded that the court should order Chiles to cease his illegal practices, and that he should be constrained to convey to the State in writing whatever claim he might have to the bonds.

Mr. Justice Miller delivered the opinion of the court. "It would be to trifle," said the justice, "with the court to make a proceeding in equity, designed to give full and final relief, and to administer complete justice, to depend upon the skill and jugglery by which a defendant might conceal some part of his defense to that suit until it was decided against him, and set it up as an excuse for disobeying the final decree of the court, or hold it out as the basis of another suit for the title and possession of the same bonds." The existence of a new contract was, therefore, an unsubstantial basis for the claim.

The court held that the decree was plain. It had declared the contract conveying the bonds to White and Chiles void, and had enjoined them from setting up *any* claim to the bonds mentioned. The assertion of claim was not limited to legal action, and, consequently, Chiles was again in error. The court, therefore, declined to be governed by the fine distinctions which the counsel for Chiles had sought to draw from the law of injunctions. The decree was intended to prevent any further interference with the rights of Texas and any obstruction to the recovery of the bonds specified in the bill.

The court decided that the holders of bonds in the United States could be forced to restore them to the State of Texas, but this was as far as the court's assistance could extend. The court could enjoin a domestic holder from setting up a claim to bonds deposited in a foreign country. This Chiles, in defiance of the spirit and intent of the decree, had done, and the court considered him to be in contempt of its authority. For this offense, he was fined $250 and costs. The court declined to order him to make over his claim to the State of Texas.[17]

[17]This is one of the most famous contempt cases, and has been cited repeatedly for precedent. For another interesting case arising out of the controversy over the Texas indemnity bonds and in which Chiles was in-

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volved, see 21 Wallace, 488. The Supreme Court later, in the interesting case of *United States v. Morgan* (*Morgan and Another v. United States; United States v. Manhattan Savings Institute; von Hoffman and Another v. United States*) had occasion to review some of the leading points of law involved in *Texas v. White* and the other cases mentioned in this chapter. See 113 U. S., 476-506.

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